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ABSTRACT

In problems pertaining to faculty dismissal, public higher education institutions are subject to both constitutional and contractual constraints, whereas private schools are subject almost solely to self-imposed contractual limitations. In public institutions, teachers alleging termination for protected free speech bear the burden of establishing that fact. However, when the faculty member alleges protected free speech activity prior to the institution's decision for termination, the institution must prove that the faculty member would not have been renewed in any event, according to "Mt. Healthy City Board of Education v. Doyle" (1974). In a recent noneducation case, "Connick v. Meyers" (1983), the Supreme Court significantly restricted the First Amendment protected rights of speech of public employees only to matters of public concern. Courts have consistently refused to find state action in nonpublic schools. In private institutions, the written contract, other institutional documents, and previous practices govern the rights of faculty. In cases of financial exigency, public universities are responsible for adherence to constitutional requirements as well as contractual agreements defined through state legislative actions and materials such as catalogs and faculty handbooks. Private colleges and universities are held responsible for matters of contract and relevant state legislation. Procedures are suggested for both public and private institutions to follow in the event of faculty dismissal for financial exigency or other causes. (MLF)

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Faculty Dismissal: Comparison of Public and Private Higher Education

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Introduction

Public and private institutions of higher education, operating as they do with different bases of support and functioning to promote different clientele interests, nonetheless present striking similarities in problems pertaining to faculty dismissal.

The purpose of the first part of this article will be to highlight similarities between the two kinds of institutions and accent the critical differences between them in the ways they must handle faculty dismissals in disciplinary situations.[1] The second part of the article will focus on faculty dismissals for other than disciplinary reasons, particularly reasons related to financial exigency. Public higher education institutions are subject to both constitutional and contractual constraints where private schools are subject almost solely to self-imposed contractual limitations.

The United States Supreme Court has declared a number of standards relevant to the subject of constitutional rights and faculty dismissal. In *Pickering v. Board of Education*[2] the Court required that a balance be struck between "the interests of the [employee], as a citizen, in commenting upon matters of public concern and the interests of the state, as an employer, in promoting the efficiency of the public services it performs through its employees."[3] In *Perry v. Sindermann*[4] the Court ruled that a teacher who had held his faculty position for four years in reliance upon a de facto tenure provision

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1. The term "disciplinary" is being used in an expansive sense to include such disparate forms of faculty treatment as "contract nonrenewal," Daulton v. Affeldt, 678 F.2d 487 (4th Cir. 1982); "denial of tenure," Stern v. Shouldice, 706 F. 2d 742 (6th Cir. 1983; "demotion," Smith v. Gwydir, 446 N.Y.S.2d 385(N.Y. App. Div.1982); as well as "dismissal for cause," Stastny v. Board of Trustees of Central Washington University, 647 P.2d 496 (Wash. Ct. App. 1982).
2. 391 U.S. 563 (1968)
3. *Id.* at 568.
4. 408 U.S. 593 (1972)

had a legitimate claim of entitlement requiring notice and opportunity to be heard.

In *Board of Regents v. Roth*[5] the Court determined no constitutional rights to "liberty" were involved where contract nonrenewal of a nontenured faculty member without any reason given did not impose any stigma or other disability that foreclosed the teacher's freedom to take advantage of other employment opportunities, or otherwise injure the employee's good name, reputation, honor or integrity in the community.[6] In *Mt. Healthy City Board of Education v. Doyle*[7] the Court held that where a teacher alleged discipline or termination for protected free speech she bears the burden of establishing that the protected conduct was a motivating or substantial factor in the termination or discipline.[8] Most recently in a non-education case the Court significantly restricted the first amendment protected right of speech of public employees only to matters of public concern:

> When a public employee speaks not as a citizen upon matters of public concern, but instead as an employee upon matters only of personal interest, absent the most unusual circumstances, a federal court is not the appropriate forum in which to review the wisdom of a personnel decision taken by a public agency allegedly in reaction to the employee's behavior.[9]

In evaluating faculty termination or discipline in light of faculty expression of public interest the Court has declared a number of factors which must be considered: the need for harmony in the office or work place; whether the school's responsibilities require a close working relationship with the plaintiff-faculty member's co-workers when the speech in question has caused or could cause the relationship to deteriorate; the time, manner and place of the speech; the context in which the dispute leading to termination or discipline arose; the degree of public interest in the speech; and whether the speech impeded the employee's ability to perform his or her duties.[10]

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5. 408 U.S. 564 (1972)

6. *Id* at 573. The *Roth* Court expressed the conditions which would impose a stigma as "a charge . . . that [the employee] had been guilty of dishonesty, or immorality."

7. 429 U.S. 274 (1974).

8. *Id.* at 287. Even if the teacher met her burden of proof the school can still prevail if it can show by a preponderance of the evidence "that it would have reached the same decision . . . even in the absence of the protected conduct."

9. Connick v. Myers, 103 S. Ct. 1684, 1690 (1983).

10. *Id.* at 1691-92.

Termination of Nontenured Faculty

Where the faculty member to be dismissed is nontenured the issues addressed by the courts are: whether the public educational institution must give a reason for faculty member termination; whether the faculty member has presented sufficient evidence under the *Mt. Healthy* doctrine to prevent summary judgment; and whether the institution or its employees are immune from lawsuits.

In *Pauk v. Board of Trustees of City University of New York*[11] a court determined that "no reasons need be given a nontenured teacher who has been denied reappointment."[12] In *Pauk* the court did not have to consider plaintiff's alleged civil rights cause of action since that cause had been earlier dismissed as time-barred.[13] However, the *Pauk* court did have to consider the most typical set of facts regarding nontenured faculty, namely those who are denied tenure and are given a final year terminal contract.

When a nontenured faculty member alleges protected free speech activity prior to the institution's decision for termination that the activity was a substantial factor in his termination, the institution has the responsibility of showing by a clear preponderance of the evidence that the faculty member would not have been renewed in any event.[14] A critical question addressed by every court is determining whether the activity is protected free speech.

The following kinds of activity have been held to be nonprotected speech: uncooperativeness represented by failure to follow requisition procedures, use of improper language to a secretary, criticism of a program and its students in the presence of other students, rudeness to a staff member, refusal to accept a reassignment in classes;[15] and lack of public concern[16] in faculty member activities such as an administrative appeal to change employment status from "faculty" to "classified,"[17] or criticism of the dean and department chairman.[18]

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11. 464 N.Y.S.2d 953 (N.Y. Sup. Ct. N.Y. County 1983)

12. *Id.* at 955.

13. *See* Pauk v. Board of Trustees of City Univ. of New York, 654 F.2d 856 (2d Cir. 1981), *cert. denied*, 455 U.S. 1000 (1982)

14. These elements constitute the *Mt. Healthy* doctrine.

15. Hillis v. Stephen F. Austin State University, 665 F.2d 547 (5th Cir. 1982).

16. *See* Connick v. Myers, *supra* note 9 and accompanying text. The Connick Court observed that:

> While as a matter of good judgment, public officials should be receptive to constructive criticism offered by their employees, the first amendment does not require a public office to be run as a roundtable for employee complaints over internal office affairs. *Id.* 103 S. Ct. at 1691.

17. Cook v. Ashmore, 579 F. Supp. 78 (N.D. Ga. 1984)

18. Landrum v. Eastern Kentucky Univ., 578 F. Supp. 241 (D. Ky. 1984). The *Landrum* Court concluded that none of plaintiff's following activities were protected free speech:

The following kinds of speech have been held to be protected speech: advising a student to seek legal advice regarding his suspension from the college;[19] appeal to the AAUP for representation and relief in the matter of a course assignment;[20] written criticisms of the college administration's handling of maternity leave;[21] general nonresponsiveness of an institution to teacher needs;[22] and refusal to prepare an outline for a course the plaintiff was not teaching at the time.[23]

Whether or not plaintiff teachers can establish proof of protected free speech activities, they are still entitled under the due process clause of the fourteenth amendment to a hearing on reasons for termination if they have a protected property or liberty interest. A protectable property interest is difficult to find where the faculty member does not have tenure.

In *Wells v. Doland*[24] a faculty member issued a terminal contract had not acquired *de facto* tenure merely because he had been recommended on two occasions for tenure by the dean of his school. The court observed that plaintiff's "mere subjective expectancy of continued employment, even though he had not attained the required years of service for tenure, did not give him the constitutionally protected property interests necessary to involve the fourteenth amendment's procedural due process provisions."[25]

In *Hillis v. Stephen F. Austin State University*[26] the trial court found that a nontenured faculty member "had no legitimate claim of entitlement to or property right in continued employment."[27] How-

(1) he turned down the real estate chair;
(2) he made suggestions in a faculty curriculum meeting about the proposed real estate program;
(3) he ran for political office;
(4) he criticized defendant Thompson for refusing to allow a woman to lead a prayer at a faculty meeting.
(5) he wanted to teach certain materials but his superiors disapproved of them;
(6) he allegedly made derogatory comments concerning his academic department's real estate program to an outsider, Realtor Russ Major;
(7) he criticized defendants Dean Thompson and Department Chairman Mullen in meetings with the "lunch bunch," a group of dissident faculty members;
(8) he wrote a highly critical 11-page letter dated February 7, 1976, which he circulated to defendants Thompson, Mullen, and faculty members.

19. Stern v. Shouldice, 706 F.2d 742 (6th Cir. 1983)
20. Hillis v. Stephen F. Austin State Univ., *supra* note 15.
21. Daulton v. Affeldt, 678 F.2d 497 (4th Cir. 1982)
22. *Id.*
23. *Id.* at 489. The administration in nonrenewing plaintiff considered plaintiff's comments to represent "a hostile and uncooperative attitude."
24. 711 F.2d 670 (5th Cir. 1983)
25. *Id.* at 675.
26. 665 F.2d 547 (5th Cir. 1982).
27. *Id.* at 552.

ever, the court tied plaintiff's lack of a fourteenth amendment property right claim to his "unsatisfactory professional performance and abrasive personality."[28] The court appears to be suggesting that plaintiff would have had a continued employment entitlement deserving of due process protection if there had not been evidence of unsatisfactory professional performance.

In *Harrison v. Ayers*,[29] a faculty member who had signed six two-year contracts had no protectable property interest because the college did not have tenure:

> Property interests are not formed in a vacuum but must stem from an independent source such as state law rules or understandings that secure benefits and that support claims of entitlement to those benefits.[30]

A nontenured faculty member has a fourteenth amendment liberty interest in his "freedom to work and earn a living."[31]

> When a public employer, in refusing to rehire an employee, makes charges against him that might seriously damage his standing in the community or otherwise imposes a stigma on the employee that forecloses his freedom to take advantage of other employment opportunities, the employee's liberty interest may be implicated and he should be granted the opportunity of a hearing to his name.[32]

The terminated faculty member has the burden of proving that the charges against him were false and that they were of the sort which might damage plaintiff's standing in the community or foreclose his freedom to take advantage of other employment opportunities.[33] Where adequate notice of one year is given a faculty member to find a new position, one court seemed to indicate as a matter of law that any reputation damage would be minimal and thus there was no deprivation of a liberty interest.[34] Moreover, where tenure policy requires a unanimous committee vote of "excellent" before tenure will be recommended, failure of a nontenured faculty member to receive such a

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28. *Id.*
29. 673 F.2d 724 (4th Cir. 1982).
30. *Id.* at 725, *quoting* Board of Regents v. Roth, 408 U.S. 564, 577 (1972).
31. Wells v. Doland, *supra* note 24, at 676.
32. *See* Board of Regents v. Roth, 408 U.S. 564, 573-75 (1972).
33. *See* Codd v. Velger, 429 U.S. 624 (1977); Sims v. Fox, 505 F.2d 857 (5th Cir. 1974).
34. Harrison v. Ayers, *supra* note 29, at 725.

vote does not amount to a judgment of incompetency and therefore the faculty member has not been stigmatized.[35] Likewise, removal of a dean, a nontenured position, for ineffectiveness as an administrator and improper performance of duties and his return to the classroom as a tenured faculty member, does not involve allegations of moral turpitude so as to stigmatize him.[36]

Colleges or universities which violate the constitutional rights of faculty in termination of contracts face the prospect of monetary judgments against the institution or its administrators. In *Daulton v. Affeldt*,[37] a $11,212 judgment against a technical institute was upheld when plaintiff was discharged for exercise of her free speech rights. Back pay can be recovered against a public educational institution on an equity theory[38] but back pay awards against school officials in their individual capacities are legal in nature.[39] As a result a terminated faculty member must specifically seek back pay from individual school officials in his pleadings or forego the possibility of such an award at trial.[40] However, if plaintiff's cause of action is founded upon violation of a liberty interest, one court has held that such a legal theory does not include reinstatement and back pay.[41]

The theory of plaintiff's claim may well determine the appropriate statute of limitations under state law. Where a plaintiff alleges breach of his employment contract in that independently guaranteed rights have been violated the appropriate statute of limitation may be something other than contract.[42]

Lawsuits against state universities or boards of education may encounter difficulties under the eleventh amendment.[43] Whether an entity is considered to be an arm or instrumentality of the state and thus immune from lawsuits depends upon state law. Although most states have abolished sovereign immunity from tort claims, consent to be sued in state court does not necessarily imply consent to be sued in federal court in a section 1983 action.[44] For example, a state

35. King v. Regents of Univ. of California, 189 Cal. Rptr. 189 (Cal. Ct. App. 1982).
36. Hicks v. Stone, 425 So. 2d 807 (Cal. Ct. App. 1983).
37. 678 F.2d 487 (4th Cir. 1982).
38. Hildebrand v. Board of Trustees of Michigan State Univ., 662 F.2d 439 (6th Cir. 1981).
39. Shirley v. Chagrin Falls Exempted Village Schools Bd. of Educ., 521 F.2d 1329 (6th Cir.), *cert. denied*, 424 U.S. 913 (1976).
40. Stern v. Shouldice, 706 F.2d 742 (6th Cir. 1983).
41. Wells v. Doland, *supra* note 24
42. Pauk v. Board of Trustees of the City Univ. of New York, 464 N.Y.S.2d 953 (N.Y. Sup. Ct. N.Y. County 1983).
43. "The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State."
44. Harris v. Arizona Board of Regents, 528 F. Supp. 987 (D. Ariz. 1981).

statutory requirement that a claim must be filed and disallowed by the requisite state agency before a court action is brought may serve to bar any action in federal court if the state requirement has not been satisfied.[45] However, a bar against an entity of the state would not necessarily bar suits against state officials.[46]

Termination of Tenured Faculty

Termination of tenured faculty tends to focus on the adequacy of cause for dismissal or the appropriateness of procedures prior to dismissal. However, other issues occasionally surface. In *Harris v. Arizona Board of Regents*,[47] plaintiff was offered a position at Arizona State University as a professor of English and director of the creative writing program. This offer contained a unique provision that plaintiff would receive tenure "automatically" in his third year of employment or sooner by mutual convenience. When the university presented plaintiff with a terminal contract for his second year, he brought a section 1983 lawsuit. Despite the existence of a formal tenure process, the court found that the extraordinary contractual circumstances of this case gave plaintiff a reasonable expectation of continued employment and thus entitled him to the same substantive standards and procedural protections as for regular tenured faculty. In so ruling the court found that the Dean of the College of Liberal Arts had apparent authority to offer tenure.

In *Walker v. Oregon State Board of Higher Education*[48] the court held that reassignment of plaintiff from her position as Head Science Librarian to a new position where she would no longer have supervisory responsibilities was not a "sanction for cause." Therefore, plaintiff was not entitled to the formal hearing used for disciplinary cases for tenured faculty. In treating this matter as a grievance instead of discipline the court observed that plaintiff "lost no salary, rank or privilege because of her reassignment."[49]

Saccini v. Dickinson State College[50] addressed the question of whether a tenure contract offered to a faculty member had to be full-time. The court held that awarding a half-time contract with tenure for an Instructor of Library Science did not violate the college's

45. *Id.* at 995; *see* Ronwin v. State Board of Arizona, 663 F.2d 914 (9th Cir. 1981); Soni v. Board of Trustees of Univ. of Tenn., 513 F.2d 347 (6th Cir. 1975); Markowitz v. United States, 650 F.2d 205 (9th Cir. 1981).

46. Alabama v. Pugh, 438 U.S. 781 (1978); Helfrich v. Pennsylvania, 660 F.2d 88 (3d Cir. 1981).

47. Harris, *supra* at note 44.

48. 674 P.2d 88 (Or. Ct. App. 1984)

49. *Id.* at 90.

50. 338 N.W.2d 81 (N.D. 1983).

regulations regarding the requirement that either tenure or a terminal contract be awarded for the seventh year of employment. "Nothing in the rules or regulations of the College or the State Board of Higher Education indicates that [plaintiff] was automatically entitled to *full-time* tenure in her seventh year . . . ."[51] It should be noted that the reason for the half-time contract was declining enrollments in the School of Library Science and at least three of plaintiff's six prior contracts had the following statement: "This is a terminal contract due to enrollment trends."[52]

When a faculty member has been awarded tenure, a frequently litigated issue concerns the reason or reasons for contract termination. A tenured faculty member clearly has the same constitutional protection for his exercise of free speech as would a nontenured faculty member. Like his nontenured colleague, a tenured faculty member "must show that his activities were constitutionally protected and that the activities constituted a motivating factor in the decisions to dismiss and suspend."[53] Defendant school "must demonstrate that the same employment would have been reached even if [plaintiff] had not engaged in constitutionally protected conduct."[54] Faculty comments about administration which have the effect of "irritating or even harassing the University's administration"[55] do not cause such speech to lose its first amendment protection.

Public comments to the press about the way a medical school is funded and administered concern matters of public importance and "clearly transcend mere academic bickering."[56] A dean removed by the president for referring to him as in need of "psychiatric help" and who publicly accused the president of being immoral, dishonest, and manipulative did not engage in constitutionally protected free speech.[57] The appeals court found that "plaintiff's conduct and utterances were significantly disruptive of good order at the college."[58]

Dismissals of faculty for immoral or unprofessional conduct always present difficult normative questions. In *Samaan v. Trustees of the California State University and Colleges*[59] a faculty member

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51. *Id.* at 86.
52. *Id.* at 82.
53. Peacock v. Duval, 694 F.2d 644, 645 (9th Cir. 1982). *See* Mt. Healthy School Dist. Bd. of Educ. v. Doyle, 429 U.S. 274 (1977).
54. *Id.* at 645.
55. *Id.* at 647.
56. *Id.* at 648. *See* Pickering v. Board of Educ., 391 U.S. 563, 571-72 (1968).
57. Russ v. White, 541 F. Supp. 888 (W.D. Ark. 1981), *aff'd*, 680 F.2d 47 (8th Cir. 1982).
58. *Id.* at 47.
59. 197 Cal. Rptr. 856 (Cal. Ct. App. 1983).

pleaded guilty to one count of grand theft for improper billing to Medi-Cal. The faculty member was required to repay $5,431.50 to the Medi-Cal program and pay a fine of $1,000. Upon learning of the conviction the president of defendant school initiated disciplinary action against plaintiff for violating the state education code[60] providing for dismissal, demotion or suspension for immoral conduct or conviction of a felony involving moral turpitude. Although a faculty committee found "no evidence of immoral conduct, unprofessional conduct, or dishonesty"[61] and recommended only a written reprimand, the president's subsequent decision to dismiss plaintiff was upheld by an arbitrator and the chancellor. The appeals court agreed with the president, the arbitrator, the chancellor and the trial court that "on the record it appears that [plaintiff] was in fact guilty of the crime of which he was convicted and his honesty was significantly impugned. Although reasonable minds might differ as to the appropriate sanction, the penalty of dismissal was not an abuse of discretion."[62]

In *White v. Board of Trustees of Western Wyoming Community College District*,[63] a tenured faculty member was dismissed during the school year for having "engaged in conduct [with students] ... which has been detrimental to the College and unbecoming your position at the College."[64] The objectionable conduct involved the consumption of alcohol and marijuana on field trips. The school board of trustees policy prohibited "the use, possession or sale of alcoholic beverages ... at college sponsored or supervised functions."[65] Plaintiff's chief defense was that "the accepted community standard at Western Wyoming College ... was alcohol consumption and drug use among students and others of the younger set."[66] In affirming the teacher's dismissal the court found plaintiff's defense refuted by the school board's policy and by applicable criminal statutes.[67]

Cases involving termination of tenured faculty at designated ages occasionally are reported. In *Spinak v. University of Akron*[68] a university rule mandating retirement at 65 was invalid for faculty mem-

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60. Cal Educ. Code § 89535.

61. Samaan, *supra* note 59, at 859. The committee also found "no nexus between plaintiff's actions and his fitness to teach."

62. *Id.* at 866.

63. 648 P.2d 528 (Wyo. 1982).

64. *Id.* at 531.

65. *Id.*

66. *Id.* at 535.

67. *Id.* at 539.

68. 445 N.E. 2d 692 (Ohio Ct. App. 1981).

bers participating in the State Teacher's Retirement System which provided for a 70 year limit. Even where a faculty member is terminated for reaching age 70 he may have sufficient protectable due process reputational and property interests to notice and a hearing.[69]

A different situation — frequently with similar results — occurs when a tenured faculty member is terminated for inadequate teaching. A faculty member who refuses to teach a course in his specialty area for which he is qualified can be dismissed following the appropriate due process hearing.[70] A faculty member who willfully absences himself from his classroom on an extended trip when previously denied permission to do so will find that the school has adequate cause to dismiss him during the school year for insubordination.[71] In refuting the faculty member's allegation of academic freedom, the court expressed a very basic rationale: "Teachers may not leave their classrooms unattended in order to exercise the right of free expression, as schools and classes cannot be conducted without someone being in charge."[72]

Where either tenured or nontenured faculty are entitled to procedural due process the following due process standards must be met:

(1) the right to be advised of the cause for termination in sufficient detail to fairly enable (the teacher) to show any error that may exist;

(2) the right to be advised of the names and the nature of the testimony of the witnesses . . . ;

(3) a meaningful opportunity to be heard . . . within a reasonable time; and

(4) a hearing before a tribunal that possesses some academic expertise and also possesses an apparent impartiality against the charges.[73]

Notice of nonrenewal to a continuing contract employee is not invalid when given later than the required contract date where the employee has more than one full year to the end of his terminal year

69. Reitzer v. Board of Trustees of State Colleges, 477 A.2d 129 (Conn. Ct. App. 1984).

70. Smith v. Kent State Univ., 696 F.2d 476 (6th Cir. 1983).

71. Stastny v. Board of Trustees of Cent. Washington Univ., 647 P.2d 496 (Wash. Ct. App. 1982).

72. *Id.* at 504.

73. Evitt v. Monroe, 590 F. Supp. 902 (W.D. Tex 1984).

contract and where he cannot show prejudice.[74] The questioned adequacy of the claims against a faculty member can be cured where he has adequate notice of charges and witnesses but plaintiff fails to take advantage of discovery procedures available.[75] Even should plaintiff be confronted with charges which he was not prepared to defend, his procedural rights will have been protected where he failed to request a continuance on the ground of surprise.[76] However, there must be adequate time between reception of notice of charges and the hearing to permit preparation of a defense; one day is not adequate.[77]

The hearing accorded the faculty member does not violate procedural due process where the topic of consideration is plaintiff's misconduct and consideration of the misconduct of another faculty member is excluded.[78] But refusal of a board to discuss any of the charges will be considered prejudicial.[79] A duly called hearing tribunal is considered impartial unless there is evidence of actual bias by one or more members.[80] Mere acquaintance by hearing tribunal members does not disqualify them as decision makers and any opinions which a tribunal member has of the accused faculty member "must be with respect to the specific charges against the accused faculty member, not with respect to some unrelated matter."[81]

The mere fact that a college president both initiates the discipline process and also serves as part of the appeal process does not in itself disprove impartiality.[82] Where the president refrains from discussing the case with other administrators while the review is in progress and, where the president listens to and reads the relevant evidence in preparing his decision, there is no violation of procedural due process.[83] But attempts by a school dean to influence a chancellor's decision on appeal through ex parte communications will be considered improper since the chancellor's decision should be based only on evidence offered at the hearing.[84] Any hearing must occur after the

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74. Boyce v. Umpqua Commun. College, 680 P.2d 671 (Or. Ct. App. 1984).
75. White, *supra* note 63, at 535.
76. *Id.* at 537. Plaintiff was expecting to defend against a charge of homosexuality but also encountered charges of alcohol consumption and drug use with students.
77. Kempland v. Regents of Univ. of California, 202 Cal. Rptr. 275 (Cal. Ct. App. 1984).
78. Russ, *supra* note 57 at 898.
79. Kempland, *supra* note 77.
80. Evitt, *supra* note 73 at 907.
81. *Id.*
82. Samaan, *supra* note 59 at 861.
83. *Id.* at 864.
84. Adelson v. Regents of the Univ. of California, 180 Cal. Rptr. 676 (Cal. Ct. App. 1982).

faculty member has received notice and prior to determination; discussions between an administrator and a faculty member prior to the furnishing of charges will be considered too remote to provide the requisite due process.[85]

Some administrative practices may be so nefarious as to render a hearing meaningless. In *Smith v. Gwydin*,[86] a community college employee was ordered by his superior to sign a statement purportedly containing verbatim responses of the employee regarding certain activities. When he refused to sign the statement he was charged with insubordination and was dismissed. In the court's opinion the employee could properly refuse to sign an inculpatory statement which would have made a hearing irrelevent.

Contract Problems

The possible application of the above constitutional rights for public educational employees to private school faculty has to date been found in legal literature.[87] Courts have consistently refused to find state action in nonpublic schools. In *Rendell-Baker v. Kohn*,[88] the United States Supreme Court refused to find state action in a private school for maladjusted children. Despite a significant number of contacts between the school and state and federal agencies the Court rejected both the entanglement and public function theories in refusing to consider the constitutional claims of teachers allegedly discharged for exercising their first amendment rights of free speech.

However, in *Krynicky v. University of Pittsburgh*,[89] a federal appeals court utilized a "symbiotic relationship" theory to find that the University of Pittsburgh and Temple University were subject to section 1983 lawsuits by virtue of both being incorporated into the state system of higher education by statute. Despite attempts to distinguish *Rendell-Baker*, the *Krynicky* court raises anew the concern about the quantity and quality of state contacts which open private schools to constitutional rights.

The contract theory has been used to sustain many ways in which private school officials deal with faculty even though similar conduct in the public sector would have faced serious due process attacks.[90]

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85. Jones v. Los Angeles Commun. College Dist., 702 F.2d 203 (9th Cir. 1983).

86. 446 N.Y.S.2d 385 (N.Y. App. Div. 1982).

87. *See* R. Mawdsley & S. Permuth, *Private Schools' Tax Exempt Status and Application of Section 1983*, School Law Update: Preventive School Law (Jones & Semler eds. 1984).

88. 102 S. Ct. 2764 (1982).

89. 742 F.2d 94 (3d Cir. 1984).

90. *See, e.g.*, Bischoff v. Brothers of the Sacred Heart, 416 So. 2d 348 (La. Ct. App. 1982); Aronson v. North Park College, 418 N.E. 2d 776 (Ill. App. Ct. 1981).

"In private institutions, the written . . . contract, other institutional documents, and previous practices govern the rights of . . . faculty . . . . Public institutions, on the contrary, are governed not only by the contract but also by the constitutional prerogatives of the Fourteenth Amendment."[91] Contract questions for both public and private institutions are governed by state law.

Although most cases turning solely on contract issues involve tenure matters, other problems may also be presented. In *Roberts v. Wake Forest University*,[92] a person hired 16 months earlier as golf coach and associate athletic director attempted to use custom and usage to prove that his discharge as golf coach violated his contract since golf coaches serve for long terms. The court determined, however, that in North Carolina where a person is employed for an indefinite period of time such a contract is "an employment at will which may be terminated at any time by either party."[93]

The question as to the legal effect of documents outside the employment contract upon the interpretation of that contract has frequently been litigated. In *Kilcoyne v. Morgan*,[94] a public university faculty manual incorporated as part of the employment contract required a tenure decision following three probationary years of teaching. Plaintiff was notified that he would be rehired for a fourth year but, prior to completion of his third year he was informed that he would not be granted tenure nor given employment beyond the fourth year. Because a state court denied his contract claim under the sovereign immunity doctrine, plaintiff sought to establish that the school's failure to follow its procedural guidelines in the faculty manual would support a section 1983 claim. However, the federal appeals court held that, where a public university "gratuitously afforded tenure aspirants procedural safeguards not constitutionally mandated, deviations from those procedures would not support a claim under the Fourteenth Amendment and Section 1983."[95]

The mere reference to external documents will not necessarily create contract rights. In *Krasik v. Duquesne University*,[96] incorporations of the ABA standards and the AALS standards into plaintiff's

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91. R. Hendrickson & B. Lee, Academic Employment and Retrenchment: Judicial Review and Administrative Action (ASHE-ERIC Higher Education Research Report 1983), at 83.

92. 286 S.E.2d 120 (N.C. App. 1982).

93. *Id.* at 123. The subject of employment at will is undergoing considerable judicial scrutiny. *See* M. Galvin, *Termination of the employee at will*, The Bench and Bar of Minnesota (April 1984), at 11. *See also* Claus v. Gyorkey, 674 F.2d 427 (5th Cir. 1982).

94. 664 F.2d 940 (4th Cir. 1981).

95. *Id.* at 942.

96. 437 A.2d 1257 (Pa. Super. Ct. 1981).

annual contract as head law librarian was held not to have created a right to continued employment. Although the court noted that AALS may want to take some action against the university, the mere incorporation of the standards and the bylaws "do not convert the agreement into a contract for permanent employment, nor do the standards or bylaws require faculty review prior to the expiration of the term of the agreement."[97] Where there is disagreement between employment criteria of a department within the university and the university's faculty handbook, a court will consider the handbook to be "the basic authority."[98]

If an external document is not referred to in an employment contract, a court will have to determine the extent of the contract. In *Clutts v. Southern Methodist University*,[99] plaintiff was promoted to associate professor by the board of trusees but her position was noted as "without tenure." The SMU bylaws provided that tenure would apply to professors and associate professors. The Texas appeals court refused to impose the bylaw upon plaintiff's contract because in Texas "an extrinsic document must be signed or referred to in the signed contract to be construed as part of the parties' agreement."[100] Since the SMU bylaws were not referred to in plaintiff's contract, they were not part of the contract.

Occasionally, issues arise regarding proper contract interpretation. In *Sucec v. Regents of University of California*,[101] an employee who received a dismissal notice filed a request for a grievance hearing 35 days after receiving the notice. Since the relevant handbook provided for 30 days from knowledge of an action to file a grievance the court presumed plaintiff was familiar with the handbook and dismissed her complaint.

In *Snowden v. Northwest Missouri State University*,[102] plaintiff received his termination notice on June 21, 1975, that the 1975-76 academic year would be his last. The faculty handbook required 12-months' advance notice prior to termination. Plaintiff argued that since the academic year ran from August through early May, he should have received notice prior to the end of the academic year. But the court determined that plaintiff's ten-month academic year was coterminous with his salary period (September through June)

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97. *Id.* at 1261.
98. University of Hawaii v. University of Hawaii Professional Assembly, 659 P.2d 732, 733 (Hawaii 1983).
99. 626 S.W.2d 334 (Tex. Civ. App. 1982).
100. *Id.* at 336.
101. 180 Cal. Rptr. 679 (Cal. Ct. App. 1982).
102. 624 S.W.2d 161 (Mo. Ct. App. 1981).

and therefore the June notice gave him 12-months' notice.

When faculty members are terminated from public colleges or universities, section 1983 claims will be raised in addition to contract claims. Although a contract theory is the only one which will prevail at the present time in private colleges, there are at least two advantages to a plaintiff's desire for success under section 1983.

First, the kind of damage to good name, reputation, and integrity as violative of plaintiff's liberty interest appears to be less than the tort standard of proof in defamation. Where a nontenured public faculty member alleges that charges against him are false and that the charges have been made public he will be provided a hearing to refute the charges.[103] However, where defamation is the only recourse to a terminated faculty member the burden of proof is heavy. Communications within administrative channels will have a qualified privilege and plaintiff can prevail only by proving malice.[104] In addition, a terminated faculty member must also prove publication of the alleged defamation. However, the action of an administrator or board in terminating a faculty member will not be considered publication.[105]

A second reason for utilizing section 1983 would be the range of remedies available which might not be available under state law for violations of contract rights: damages against institutions and administrators for violating established statutory or constitutional rights;[106] back pay for violations of constitutional right[107] or statutory right;[108] damages for termination not in substantial compliance with procedures in the employee handbook,[109] and damages for mental anguish as a result of violations of due process.[110]

Financial Exigency

Dismissals based on financial exigency, unlike those for cause or disability, are impersonal; they are unrelated to the views of the dismissed teacher. A professor whose appointment is terminated because of financial exigency will not be replaced by another with more conventional views or better connections. Hence bona fide

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103. Wells v. Doland, 711 F.2d 670, 676 (5th Cir. 1983).
104. Snowden v. Northwest Missouri State Univ., *supra* note 102 at 168-69.
105. Hicks v. Stone, 425 So. 2d 807, 813 (La. Ct. App. 1983).
106. Stern v. Shouldice, 706 F.2d 742, 749 (6th Cir. 1983).
107. Kempland v. Regents of Univ. of Cal., *See supra* note 77.
108. Spinak v. University of Akron, 445 N.E.2d 692 (Ohio Ct. App. 1981).
109. Piacitelli v. Southern Utah State College, 636 P.2d 1063 (Utah 1981).
110. Jones v. Los Angeles Commun. College Dist., 702 F.2d 203, 207 (9th Cir. 1983).

dismissals based on financial exigency do not threaten the values protected by tenure. *(Krotkoff v. Goucher College,* 585 F.2d 675 (4th Cir. 1978)).

Dismissal of faculty for reasons of financial exigency is a relatively new area of discussion and litigation in higher education. Factors such as a diminishing college-age population and decreased financial support from federal and state governments have caused universities to change planning models from the expansion paradigms of the 1950s to models reflecting fewer students. Along with fewer students is the concomitant need for fewer faculty members, including those who are tenured, and/or the discontinuance of programs in the university.

As in the case of dismissal for cause, public universities are responsible for adherence to constitutional requirements as well as contractual agreements defined through state legislative actions and materials such as catalogues and faculty handbooks. Absent state action, private colleges and universities are held responsible for matters of contract and relevant state legislation. As one source notes "(I)n applying state law to a suit brought by terminated faculty, state courts will generally examine the documented basis for the decisions, including financial facts and circumstances, enunciated policies, and faculty recommendations, as well as review other court decisions dealing with retrenchment."[111]

Essential to any decision of "financial exigency," in either the public or private sector, is an understanding of what the term means. Needless to say, differences do exist. Wilson[112] suggests that it "refers to a situation in which the financial problems facing an institution are so serious that they may constitute adequate grounds for dismissal of tenured faculty."

A far more rigorous and imposing definition is provided by the AAUP as part of its 1976 statement on *Recommended Institutional Regulations on Academic Freedom and Tenure.* This commentary suggests that financial exigency is an "imminent financial crisis which threatens the survival of the institution as a whole and which cannot be remedied by less drastic means." Absent specific contractual language aligning with the AAUP statement, courts have tended

111. Legal Desk Book for Administrators of Independent Colleges and Universities (K. Weeks ed. 1983) at IV-21.

112. F. Wilson, *Financial Exigency: Examination of Recent Cases Involving Lay off of Tenured Faculty.* 4 J. of College & U.L. 189 (1978).

to move closer to the definition provided by Wilson.[113] What is clear, regardless of definition, is that states, governing bodies, and universities need to develop policies and procedures to anticipate a state of financial exigency in order to prevent major confrontation in the legal arena despite the "neutral" effect noted in *Goucher.*

The Public Sector

Cases involving financial exigency in the public sector have dealt with both first amendment and, predominantly, fourteenth amendment issues. First Amendment issues have been raised in the case of *Duarte v. Mills,*[114] where the court ruled that the dismissal of a community college Spanish instructor for "exigent" reasons was, in fact, dismissal for actions guaranteed under the freedom of speech clause.

Concern with first amendment rights also developed in *Mobey v. Reagan.*[115] In this case a nontenured philosophy faculty member was non-renewed but suggested that his dismissal was based on disagreements with other faculty members in the academic senate and not an overstaffed department as the college claimed. In remanding the case for further finding of fact, the appellate court noted a warning for all who would dismiss under "exigency" without appropriate constitutional understanding:

> (W)e emphasize that the trier (of fact) must be alert to retaliatory terminations . . . whenever the state terminated employment to quell legitimate dissent or punishes protected expressive behavior, then termination is unlawful.

Fourteenth amendment issues are particularly of concern when the dismissal involves tenured faculty members. These faculty have a right to due process given their property interests as noted in such cases as *Roth.*[116]

Perhaps the leading case involving questions of due process is *Johnson v. Board of Regents of the University of Wisconsin.*[117] As a result of a biennial budget reduction in 1973-75 made to the Wisconsin system, thirty-eight tenured faculty members on six campuses of

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113. *See* Kelly, Michael & Kitabchi, Financial Exigency and Faculty Dismissals: Guidelines for University Dismissals (Paper presented at the Annual Meeting of the Association for the Study of Higher Education March, 1983), at 27.

114. No. C-C-76-230 (W.D.N.C. March 6, 1979).

115. 537 F.2d 1036 (9th Cir. 1976).

116. Board of Regents v. Roth, 408 U.S. at 566, 577.

117. 377 F. Supp. 227 (W.D. Wis. 1974), aff'd, 510 F.2d 975 (7th Cir. 1975).

the university were dismissed. The dismissals were made under a state statute that employment for the tenured professors was "permanent, desiring efficiency and good behavior" and "may not be terminated involuntarily except for cause."[118]

Each chancellor was responsible for describing how the budget reduction would take place and notified each faculty in May 1973 of non-renewal effective June 1974. The board of regents established a reconsideration process for the proposed layoffs once the chancellors had made their decision. In this process:

a. each affected faculty member would be given a written description of the Regents' reconsideration procedures;

b. at the request of the affected faculty member, a written explanation of the reason or reasons for layoff would be provided by the appropriate department chair or college dean;

c. the faculty member might then request the convening of a "reconsideration committee." The committee was to consist of at least five tenured faculty, to be appointed by the chancellor with advice from the faculty governing body. No person who took part in the original decision to lay off a given faculty member could sit on this committee;

d. the committee was to submit its findings and recommendations to the chancellor who, within ten days, was to inform the faculty member of his decision in writing. The decision of the chancellor was final; and

e. in its deliberations, the reconsideration committee was limited to two areas of inquiry — whether there was enough evidence to support the decision to lay off, and/or whether there had been a material deviation from the procedures, established by the president and chancellor, of determining the fiscal and programmatic needs of the university, including the procedures of identifying the persons to be laid off.

The dismissed faculty, Johnson and others, filed suit in United States district court alleging denial of minimal procedural due process on two grounds, namely (1) the property interest in tenure was being denied by the action taken; and (2) the decision-makers —

118. Wis. Stat. § 37.31.

chancellors at five of the campuses and reconsideration committees on one — were not neutral or impartial. In rendering its decision, the district court noted that it is the responsibility of the university, and not the courts, to determine when layoffs might be mandated. It further acknowledged that the professors did have a property interest, even absent statutory recognition of the fact. In this case, the court distinguished between an apparent higher level of due process needed for discharge in an "adjudicating" situation (e.g., poor performance, unpermitted conduct) and cases such as this, in which "legislative decision might affect an individual property interest without being directed specifically at such interest," that is to say, procedural safeguards are less exacting and demanding in cases of financial exigency than those of discharge for cause.[119]

In rejecting the plaintiffs arguments regarding the property interest question, Judge Doyle stated:

> (S)o far as the 14th Amendment is concerned, a tenured teacher in a state institution is protected substantially — so to speak — only from termination or layoff for a constitutionally impermissible reason (such as earlier exercise of First Amendment freedom of expression, or race or religion), and from termination or lay off which is wholly arbitrary or unreasonable. The Fourteenth Amendment requires only those procedures which are necessary to provide the tenured teacher a fair opportunity to claim this "substantive protection."[120]

Regarding the second argument, Judge Doyle responded that "it is well within the process of the state, so far as the federal constitution is concerned, to assign to the chancellors of the respective campuses the authority both to make the initial decision to lay-off specific tenure faculty members and to make the ultimate decision."[121]

Of significant interest are the listing of four essential statements regarding minimal procedures that Judge Doyle suggested must be met. They were (a) furnishing each plaintiff with a reasonably adequate written statement of the basis for the initial statement to lay off, (b) furnishing each plaintiff with a reasonably adequate description of the manner in which the critical decision has been arrived at, (c) making a reasonably adequate disclosure to each plaintiff of the information and data upon which the decision-makers had relied;

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119. Permuth, & Mawdsley, *Financial Exigency in Higher Education*, 4 Educ. L. Rep. 1 (1982).

120. 377 F. Supp. 227, 239 (W.D. Wis. 1974).

121. *Id.* at 240.

and (d) providing the plaintiff the opportunity to respond.[122] The opinion of the district court was affirmed by the Seventh Circuit Court of Appeals in 1975 without opinion.[123]

In other key public higher education cases, there has been a great tendency to focus on the procedural guidelines established in *Johnson.* In *Levitt v. Board of Trustees of Nebraska State College,*[124] legislative budget reductions led to the dismissal of tenured faculty at Peru State College. Finding that objective criteria were used and that no attempt was made to characterize any of the dismissed faculty as incompetent, the court commented that the plaintiffs were afforded adequate due process. As in *Johnson,* the court stated that it is the province of the schools to note which faculty should be released and that the process should be reasonable and fair. Similarly, the dismissal of a tenure faculty member from a Colorado public college was upheld, even with the retention of a nontenured faculty member in the same department when the decision was made "to meet the needs of the department, was based on substantial evidence, and was made in good faith."[125]

The Private Sector

In the private sector, those cases of particular note emphasize the need for universities to carefully plan for their future rather than react to it. The first and perhaps most important case is that of *AAUP v. Bloomfield.*[126]

The Bloomfield College Board of Trustees declared a state of financial exigency and gave one-month's notice to eleven tenured and two nontenured faculty. Further, the remaining fifty-four faculty members were informed that they were on one-year terminal contracts with "selective hiring" to occur for those returning for following years.

The American Association of University Professors, the bargaining agent for the faculty, brought suit based on violation of contract. AAUP maintained that financial exigency was not at hand and the actions of the board were to eliminate tenure. In addressing the suit, the court carefully studied the policy statements of the contract. The specific provisions noted were:

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122. *Id.*
123. 510 F.2d 975 (7th Cir. 1975).
124. 376 F. Supp. 945 (D. Neb. 1974).
125. 589 F.2d 475, 477-578 (10th Cir. 1978) (as noted in *Kelly*).
126. 129 N.J. Super. Ct. App. Div. 249, 322 A.2d 846 (1974). *aff'd,* 136 N.J. Super Ct. App. Div. 249, 346 A.2d 615 (1975).

> (A) teacher will have tenure and his service may be terminated only for adequate cause, except in case of retirement for age, or under *extraordinary circumstances* because of financial exigency of the institution. Paragraph C(3) [emphasis added]
>
> Termination of continuous appointment because of financial exigency of the institution must be *demonstrably bona fide.* A situation which makes drastic retrenchment of this sort necessary *precludes expansion of the staff at other points at the same time, except in extraordinary circumstances.* Paragraph C(6) [emphasis added]

On each point, the court argued that the college had overstepped its own authority. First, the major problem was cash flow which could be met in other ways save dismissal of the faculty (e.g., sale of valuable real property). Second, the preponderance of evidence suggested that the new "direction" for the college was vague and the real reason for dismissal was to eliminate tenure. The appellate court agreed with the trial court regarding the issue of tenure, but suggested that it erred in terms of defining too narrow a definition of exigency:

> In our opinion, the mere fact that this financial strain existed for some period of time does not negate the reality that a "financial exigency" was a fact of life for the college administration within the meaning of the underlying contract. The interpretation of "exigency" as attributed by the trial court is too narrow a concept of the term in relation to the subject matter involved. A more reasonable construction might be encompassed within the phrase *"state of urgency."* In this context the evidence was plentiful as to the proof of the existence of the criterion of the financial exigency required by the contract.[127]

A strikingly similar decision to the appellate court decision in *Bloomfield* was reached in *Krotkoff v. Goucher College.*[128] When the issue of whether endowment needed to be expended before termination of tenured faculty was sought, the court noted that "(T)he expenditure of financial exigency should be determined by the adequacy of the College's operating funds rather than its capital assets."[129] The court noted that the college used reasonable standards

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127. Permuth & Mawdsley, *supra* note 119.
128. 585 F.2d 675 (4th Cir. 1978).
129. *Id.* at 681.

in selecting faculty to terminate and reasonable measures to seek alternative employment for those dismissed.

The question of whether financial exigency must be institutional or restricted to a college or department was addressed in *Schreuer v. Creighton University.*[130] In *Schreuer,* the court felt the judgment of the administration to terminate a member of the pharmacy college based on the status of that particular unit was justified. Absent the specific restrictive language of the AAUP 1976 RIR statement as noted above, the court suggested that the university was justified in implementing layoffs.

Conclusion

Termination of faculty can be for disciplinary as well as non-disciplinary reasons. Such termination can affect tenured or nontenured faculty and occur at public or private institutions of higher education. Although most of the litigation involving dismissal of faculty involves public universities, it can reasonably be expected that private schools will become increasingly affected as declining enrollments require reduction in faculty. Where faculty are to be dismissed for other than financial reasons considerations of the following procedures may help in minimizing the prospect for litigation:

(1) Review employee handbooks and personnel policies to insure that the wording is clear and specific.

(2) Review all documents of employment, including personnel policies, application forms and handbooks to insure consistency on all material points.

(3) Set up a grievance procedure to review all employment decisions, including discharge, and objectively review it to determine if it would appear fair to a jury. Institute personnel prodecures to inform faculty of the availability of the grievance procedure and to insure that the grievance procedure is rigidly followed.

(4) Review the performance appraisal system. Train the appraiser to give an honest and objective appraisal. Insure that the appraiser is in a position to evaluate the faculty member's performance and that the characteristics appraised are job

130. 260 N.W. 2d 595 (Neb. 1977).

related. Give the faculty member an opportunity to review and discuss the completed appraisal; however, the evaluator involved must be trained to avoid the types of generalized comments which might be alleged as a promise or contract of continued employment.

(5) Review job termination procedures. Each faculty member's file should be reviewed by the appropriate person before termination is initiated. Give faculty members the correct reason for termination.

Where the reason for termination of faculty is financial exigency, institutions and faculty would be well-advised to develop policies regarding such an eventuality before it occurs. In doing so, concentration should be placed on:

(1) criteria to be used in declaring a state of exigency;

(2) criteria used to dismiss tenured faculty;

(3) procedures to be used;

(4) means for appeal and a fair hearing after a decision is made; and

(5) resources to aid retrenched faculty in seeking other positions within and outside the given institutions.